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IN THE

Supreme Court of the United States

October Term 1971

No. 6698

WILLIAM A. GANCI,
Appellant-Petitioner,

against

THE STATE OF NEW YORK,
Appellee-Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To:

The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States

The petitioner, William A. Ganci, prays that a writ of certiorari shall issue to review a judgment of the New York State Court of Appeals entered on January 20, 1971.

Opinions Below

The judgment in the Appellate Division, Second Department, New York State Supreme Court, is reported at 33 App. Div. 2d 797 and that of the New York State Court of Appeals at 27 N.Y. 2d 418.

Jurisdiction

The jurisdiction of this Court is apparently sought pursuant to 28 U.S.C. § 1257, sub. 3, it being argued that petitioner's Sixth Amendment right to a speedy trial has been denied him because of 19 month delay between arrest and trial.

Questions Presented

The undisputed facts are Ganci went on a crime spree in Nassau and Suffolk Counties commencing in 1965 and continuing until 1967. As a result, a whole series of indictments followed in both counties and, when indicted in the case which is the subject of this application, Ganci was in state prison serving a prison sentence out of Suffolk County requiring his return to Nassau for trial.

It is conceded the delay was not occasioned by the District Attorney but the crowded calendar conditions existing in the County Court, County of Nassau. It is contended the delay of 19 months between arrest and trial including 16 months from indictment to trial, as a matter of law, fell below the minimum requirements of the Sixth Amendment. The respondent argues to the contrary.

The Pre-Trial Identification Hearing

Nancy Vitale (7, *et seq.**) testified that on the morning of March 18, 1967, she was at work after 8:30 A.M. in the Courtesy Booth-Office of the Grand Union Store in Green Acres Shopping Center (8-10).

Shortly before 9:00 A.M., she observed through the store window three men getting out of a car and walking toward

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* References herein are to page numbers of the transcript of Hearing Minutes.

the store. These men were facing her as they walked, and passed within fifteen feet of her (11-12).

Miss Vitale momentarily lost sight of the individuals as they entered the store door through a vestibule. The door was about five feet away from her (15).

The man in the center was wearing a dark jacket, slacks, a hat and sunglasses (17). Another one of the men was wearing a greenish-like army jacket, had blonde hair and wore no hat or sunglasses. She did not look at the third man too well (11-18).

Only two of the three men entered the store, namely the two she had just described (19).

The man who wore the sunglasses took a shopping wagon, went into an aisle of the store very near the witness, where she observed him staring into her office for approximately two or three minutes (19).

The blonde man remained next to a soda machine to the right of her booth (19).

Miss Vitale continued to watch the face of the man who was wearing the sunglasses, looking him full in the face (20). At this point, she went to Vito Scudera, the store Security Man, had a conversation with him for a few minutes, and then returned to her little booth (20).

Shortly thereafter, the man with the sunglasses came up to her booth, pointed a gun through the booth window and demanded that the witness open up her booth. She was looking directly at his face at this time (21).

The victim opened the door, and the defendant entered the booth and then stooped down. The witness, who is 5′ 8″ tall, indicated this defendant was either the same height as she or a little shorter (22).

The defendant then demanded all the money in the office, and she saw his entire face. She complied with the de-

mand, and he directed that she open the safe. She gave some excuse for not doing so, and defendant then took some rolled change from one of the cabinets, putting all this loot into a shopping bag (22-24).

The accused then backed out of this small booth, and the witness found herself crying, following which the holdup man walked out of the store (24).

Following this Miss Vitale observed Mr. Scudera, the Security Man, walking behind the man (25).

At this point in the hearing the witness identified the perpetrator as the defendant, William A. Ganci, seated in the courtroom (25).

Later that morning, the witness went to a police station where she looked at hundreds of pictures for about two hours, but she did not recognize anyone (26).

On Tuesday, March 21, 1967, she saw a detective in the morning, who showed her five pictures. The officer asked her if she could recognize any of the pictures. She looked and recognized one picture, it being the photograph of the man who held her up (28).

The defendant Ganci was then identified as the man who perpetrated the robbery and whose picture she recognized (29).

Miss Vitale further testified that on the day of the robbery she had observed the defendant for approximately seven minutes total (30).

At about 2:00 or 2:30 A.M. of March 22, 1967, she received a telephone call from a detective, and she went with the detective to a police station in Baldwin where a lineup was being held (30-31). She looked through a window at some men standing in the room, and recognized the defendant as one of those individuals (32).

She completed her direct testimony by stating that her recognition of the defendant at the station house was based upon her recollection of the robbery at the store.

On cross-examination, she conceded that she had seen the defendant at his felony examination (62) and that she may have seen a picture when she testified before the Grand Jury (55-62).

The witness further testified that she identified the defendant on this identification hearing because she could not forget the man who held her up. She stated she knew it was the same man and that she identified him not because of her prior court appearances (64).

The witness again described the defendant as being approximately 180-lbs., 5′ 8″, heavy set but not fat, dark and needing a shave (66).

Miss Vitale conceded that the defendant wore large sunglasses which ran from his eyebrow to an inch below the eye, and that his hat brim at a point came down to the top of the glasses (67, 68).

With respect to the lineup at the police station, she saw four or five men who were standing together facing her, but not in any particular straight line (72, 73).

As soon as she saw the defendant amongst these men she didn't bother looking anymore (74).

All the men in the lineup were facing her and had dark hair, looked about the same height, although one might have been a little shorter than the others (75-76).

The witness did concede that the defendant looked substantially different from the other men from a point of view of what he was wearing in relation to the other men (94).

When the detective picked her up to go to the police station he merely told her he wanted her to look at some

men, but he did not tell her that the defendant had been arrested or that the man whose picture she had identified was apprehended (95).

The witness did not see any pictures on the night of the lineup before she went in to view the lineup (96).

The detective at no time told her, nor did he point out, the defendant was in the lineup room (98).

Upon seeing the defendant's face in the lineup, she started to cry and wanted to leave, since she knew it was the defendant the minute she saw him (98, 99).

None of the officers told her who her attacker had been by name or otherwise (107, 109).

Miss Vitale stated she was frightened at the time of the holdup when she saw the gun, and she began to cry when she was told to open the safe, which was about a minute before the robber left the premises (111, 113).

In addition, the police had shown her some pictures of guns, and she had picked out a photograph of a particular type of gun. The police then told her she had picked out a .38 calibre weapon (114).

Vito Scudera (119, *et seq.*) testified that on the day of the robbery he was on duty at the Green Acres Grand Union store as a Security Officer (119).

Shortly before 9:00 A.M., he had a conversation with Nancy Vitale near the Courtesy Booth (120).

Scudera had been a New York City policeman for thirteen years (120-121). He testified that after his conversation with Miss Vitale he saw two male individuals (121).

One of the individuals was wearing a dark fedora hat and dark sunglasses (121). Mr. Scudera first saw this suspect walking back and forth through the store aisles.

The officer observed him place a loaf of bread in the carriage and then go to the store checkout counter (122).

The witness also observed the same person for a total of four or five minutes and noticed that he had a heavy beard and had a distinctive walk about him (123).

In addition, Scudera observed the lower portions of the man's face and the right profile of the individual (124).

Once Scudera saw the man at the checkout counter, he then started to look for a second man whom he could not find. Following this, he started to go to the front of the store (124).

Mr. Scudera then observed the man who had been wearing the hat and sunglasses coming out of the Courtesy Booth in a crouched position, holding a shopping bag in one hand. His right hand was in his pocket (125).

The witness surmised a holdup was in progress, and he walked toward the man very rapidly and was approximately ten feet from him (125).

Scudera followed the defendant outside into the parking lot, grabbed him and threw him against a parked car (126). In the course of the struggle, the shopping bag broke, and money and checks were strewn over the parking lot (126).

At this point, Mr. Scudera was hit from behind on his head, but he still held on to the individual. Someone pried the witness away from the robber and held a gun on him (127).

At this juncture, the witness was facing the man with the fedora and sunglasses, and was only two to three feet away from him (127).

Mr. Scudera was then ordered to get under a car, which he did, and from this position he was able to see people picking up the strewn money. The robbers then

got into a car, and the witness was able to observe and copy down the license plate of this automobile (127-129).

Mr. Scudera identified the defendant as the man who wore the fedora, and there was no doubt in his mind about this (129-130).

On the afternoon of March 21, 1967, the witness was present at Suffolk County Police Headquarters Identification Bureau (131).

One of the detectives threw out a half dozen pictures on a desk and asked Mr. Scudera to look at them. The witness then picked up a picture of the defendant (132).

At 12:30 A.M. of March 22, 1967, the witness went to the First Precinct Station House in Nassau County, where he looked through a one-way mirrored door into a room (134-135). There were three persons in the room, one of whom was the defendant (135).

On cross-examination, Mr. Scudera stated he recognized the defendant but could not recall how the defendant was then dressed although he was positive that the defendant was the man (136).

Scudera also testified that when he first looked in the room, the defendant was seated in a chair, but then got up and walked, and the witness knew he was the holdup man (138, 142).

After focusing on the defendant's walk (148) and observing the defendant's face, the witness indicated "That's the clown that held us up" (157).

Mr. Scudera also testified that none of the officers suggested anything to him regarding the identification procedures. He was merely told to go and view the suspects (168, 169).

As far as he was concerned, the three men in the lineup room were about the same height (177).

With respect to his observations of the defendant at the time of the robbery, Mr. Scudera insisted that he could see part of the defendant's forehead between the sunglasses and hat brim (180, 181) as well as the portion of the face below the sunglasses (181).

The second man whom Scudera saw in the store was dark (183-184).

Mr. Scudera testified he was not with Miss Vitale when she viewed hundreds of photographs (216).

None of the officers made any suggestions to him when he was asked to view the photographs (224). Scudera was also in a courtroom a few days after viewing the lineup where he saw the defendant in the presence of counsel at the counsel's table.

When Scudera identified the defendant in a courtroom a few days after the lineup, he had in mind the holdup and that the defendant was the perpetrator of that crime (260-261).

In response to the Court's question as to what he based his identification of the defendant, Scudera replied:

> "I based it on the fact that I viewed this—now known as William Ganci to me—I viewed him in the store, which I actually viewed him for a good five minutes. At the time of the holdup I saw him coming out of the booth. When I actually grabbed him and I was torn away from him I got a good view of his face. I got another good view of his face when I identified him at the station house. I also saw him in court, and there is no question in my mind, your Honor, that this is the same individual who held up the Grand Union store on March 18th, 1967." (263)

Detective James Bishop (270, *et seq.*) testified that at 3:00 A.M. of March 22, 1967, he brought Miss Vitale to the First Precinct, where he saw her view a lineup of men through a window in the station house (271-272).

She made her actual viewing at about 3:30 A.M. and left the station house fifteen minutes later (273).

The officer never suggested to her whom she should identify (273).

On cross-examination, the officer testified that there were more than three or four men in the lineup room, who were all white and in shirt sleeves (278-280). He further stated that the defendant was of the same size as some of the other men in the room (282-283).

Detective Donald L. Sondergaard (302, *et seq.*) was called as a witness by the defendant.

This officer testified that during the early morning hours of March 22, 1967 he saw Nancy Vitale at the First Precinct Station House.

He stated the defendant and four detectives were in the lineup room, but that he was not present when Miss Vitale actually viewed this lineup (305).

The Court pronounced its findings of fact and law (317-320a).

The Court found that the identifications made by the witnesses Vitale and Scudera were based upon their individual observations of defendant's features during the robbery, and that their present recollections in the courtroom were not based upon whatever they observed later at a police station (317-318).

The Court also found that the demeanor of the two witnesses impressed the Court favorably which gave credibility to their observations (318-319).

The Court then found, as a matter of law, that the viewing of the defendant at the police station violated due process, but that this procedure at the police station did in no way taint the identifications made by the witnesses because the Court found that the separate and individual identifications made at the hearing by the witnesses were original, independent and predicated upon their observations at the time of the robbery (319).

The Court also found that the in-court identifications were not tainted by the viewing of the photographs prior to the lineups.

The Trial

In the defense's opening to the jury, counsel conceded the crimes charged were committed, but that the defendant was not guilty (31).

After the opening, defense counsel orally moved, in the absence of the jury, to dismiss the indictment for lack of a speedy trial (39).

In his answer, the prosecutor argued the trial came on in its regular order, and the delay was caused by defendant's dissatisfaction with three assigned lawyers.

Nancy Vitale (45, *et seq.*) was the first witness for the People, and her direct testimony followed that at the identification hearing.

She testified she kept the face of the man in the center under her observation while he was outside walking towards her (53).

She observed him take a shopping wagon and remain at a store aisle for a moment or two, following which she had her conversation with the store Security Officer (55).

In this conversation, she told Scudera about seeing three men, but only seeing two come into the store. The

witness asked Scudera, the Security Officer, to watch these men since they looked suspicious (57-58).

Miss Vitale kept staring at the man with the hat and glasses inside the store (63) and she observed him for at least seven minutes (67).

She also observed the defendant's face from below the eyes, saw parts of his forehead and observed a profile of the sides of his face (67-68).

The witness further testified the robber took $2,000 from her, which she had collected the night before (69).

Miss Vitale then identified the defendant in the courtroom as the individual who held her up (71).

A photograph of a car was identified by the witness as the car from which the three men got out (95).

On cross-examination, Miss Vitale testified that the defendant had the brim of his hat turned down and was wearing large sunglasses so that she could not see his eyes (117). The sunglasses came to about ½" below the eyes (118), and she demonstrated in the courtroom by means of a picture the distance that the sunglasses fell below the eyes (119).

The victim further testified:

> "I couldn't forget his face. They (having reference to the defendant's cheek, nose and mouth) wouldn't look like anybody else's, no." (120).

The witness could not remember the looks of the assistant district attorney, who conducted a felony examination in this case (132-133, 151), but she insisted she knew the defendant (157).

On redirect examination, Miss Vitale testified that one-half hour after the robbery, she saw Detective Bishop at

the store and gave to him a description of the defendant (196).

At this juncture in the trial, the judge would not permit the prosecutor to ask the witness where she went with the police after the robbery, and the Court precluded the prosecutor from going into prior photographic identifications made by the witness.

Miss Vitale finally testified that the basis of her in-court identification was her identification at the store (207).

Vito Scudera (210, *et seq.*) the store Security Officer, reiterated the testimony he had given at the identification hearing, with regard to his encounter with the defendant.

He also testified that the plate number he took from the getaway vehicle was New York Plate No. VH 1876 (219).

The witness testified the defendant had a distinctive walk, which he described, in that the defendant walked somewhat straight with his toes pointed outward (221).

When the witness was out in the parking lot and had been pried away from the defendant, and the defendant then yelled to shoot the witness, Mr. Scudera was looking at the face of the defendant (222).

On cross-examination, this former police officer testified that the defendant was a heavy shaver, had a heavy beard, and he remembered the defendant's face (242-243).

As a former motorcycle policeman, he had testified hundreds of times, and identified defendants in courtrooms without any difficulty (245).

Mr. Scudera further testified that at the time of the robbery he observed part of the defendant's forehead (248) which approximated about 2″ of the forehead (281).

In addition, the witness saw about 80% of the defendant's right profile (284) and saw the defendant's face from a point ¾" below each eye (285).

There was no doubt in his mind that the defendant was the man whom he followed and scuffled with at the time of the robbery, and that his identification was based upon his observations of the actual events that occurred on March 18, 1967 (289).

John Yannotti (307, *et seq.*, 458, *et seq.*, 471, *et seq.*) testified he was the produce manager at the Grand Union store on the day of the robbery, and he saw Nancy Vitale in her booth close to 9:00 A.M. of that morning. He was about 80 feet away from her (307-308).

The witness observed a man in the booth with Nancy, and the man was wearing sunglasses and a hat, and had with him a shopping bag (309).

He also saw Scudera scuffle with this man outside and observed the shopping bag break open during this scuffle (310).

The witness then observed a car pull up, a man exit from the car and hit Scudera in the head with a gun (310).

When the man with the hat departed, the witness was only 60 feet away (311).

Mr. Yannotti described the car that pulled up as a black Ford bearing license plate VH 1876, which he gave to the detectives (311).

On recall the witness testified that he only saw the rear portion of this black Ford, and People's Exhibit 1 for identification looked like the car he saw (460).

On further recall examination, Yannotti testified when he noticed this black Ford automobile, the back of the car

had the left fender banged in and smashed (471), and he identified two photographs as being a fair and accurate representation of that car (472). These photographs were admitted into evidence as People's Exhibits 17 and 18.

On recross-examination, Yannotti stated he was only about 20 to 25 feet from this car when he saw it from the store window (480, 481, 487).

Robert Drury (316, *et seq.*) testified he was a Grand Union employee for over twenty years, and was 55 years old (317).

On the day of the robbery, he was in the store at a check-out counter, which was about 30 feet from Nancy Vitale's booth (318, 319).

From this point, he saw a man leave the store with a shopping bag, and he observed Vito Scudera following this man outside. After this, he saw two men follow Scudera outside, one of whom hit Scudera over the head with a gun butt (319-320).

The witness went outside and grabbed one of the arms of one of the men, but the witness was knocked to the ground (319).

Drury was then ordered to crawl under a car (320).

Drury also observed that one of the two men who had followed Scudera out of the store had been standing by the Pepsi soda machine, which was near the telephone next to the store office (320).

Detective James Bishop (324, *et seq.*) testified he was a ten year veteran of the County police force, a detective for over six years, and had been assigned to investigate the Grand Union robbery (325).

The officer responded to the store and interviewed Nancy Vitale and others there (326).

At this point there was a colloquy, out of the jury's presence, between the Court and counsel, it appearing that the prosecutor wished to show that the license plate number on the getaway car was fictitious and that when the defendant was arrested he was driving this car. It was indicated in the colloquy that the license plate was issued to a fictitious person (326-360).

Detective Bishop then testified that Yannotti gave him Plate No. VH 1876, following which the officer got the name and address for that plate from the Motor Vehicle Bureau. The officer then went to Patchogue to check out the address of this registration, and found it to be a vacant lot (363-367).

The Detective also ascertained the name on the registration for that plate number, but was unable to locate the named registrant, although he sought the assistance of the Postmaster in Patchogue (370).

After he interviewed the witnesses at the supermarket, he departed with Nancy Vitale (373).

On cross-examination, the officer conceded he was never able to trace this license plate to the defendant (411).

The officer further testified on redirect and recross-examination that he had made mistakes with respect to the color of the automobile utilized in the crime by the perpetrators (412, 415, 417, 420).

Moreover, the officer affirmed it was his mistake and not Miss Vitale's (421).

Morris Samtur (423, *et seq.*) was an employee of the State Motor Vehicle Bureau, and brought with him official records pertaining to the license plate VH 1876. A colloquy developed regarding his expected testimony. After this colloquy, he then testified he had brought the records with him pertaining to that license plate, and they indicated the plates were issued to a Barbara Morrelli of Clark Street,

Patchogue, and that the registration for these plates covered a 1961 Dodge, color beige (431-436).

Detective Donald S. Sondergaard (436, *et seq.*) testified he had been a policeman for about 15 years and a detective since 1961, currently assigned to the Auto Squad for about a one year period (436-437).

The officer testified that on March 21, 1967, at about 10:10 or 10:15 P.M., he arrested the defendant in Lindenhurst. At the time of this arrest, the defendant was driving the motor vehicle depicted in People's Exhibit 1, and that the license plate on this car at the arrest was 4108 SP, New York plate (438-439).

It was elicited from the officer on cross-examination that he made the arrest without a warrant (440-443).

Another lengthy colloquy, in absence of the jury, then ensued, during which it was pointed out that the arrest was made on the basis of investigations of other armed robberies in the First Precinct; that the defendant allegedly committed other robberies according to these investigations, and that the officer had received this knowledge from other detectives (445).

It was also indicated by the officer during this colloquy that the defendant was arrested on Sondergaard's case as well as for the case on trial, and the Court indicated that it would allow the detective to say that his arrest was based upon investigation and not based on identification of the defendant previously made by photographs (446-448).

The Court then instructed the officer to use the word "investigation" in the singular when the jury returned (449).

Upon the jury's return, the officer then testified that his arrest was based upon investigation and conversation with other detectives assigned to the case (451).

The People rested (492).

Defense then moved to strike all evidence pertaining to plate No. VH 1876. Other motions were made and denied (493-498).

The defense then rested (499-500).

On defense summation, counsel conceded the commission of the robbery, but submitted to the jury that the defendant was not one of the robbers (510-511).

Counsel also conceded that Ganci was driving a black Ford three days after the crime (514).

He charged that Miss Vitale's identification of the defendant was based upon her observation of him in the arraignment court, and suggested that detectives pointed the defendant out to her (526).

Counsel also urged the jury that her identification was also based upon her viewing the defendant in court proceedings (528-529).

Counsel described the witness Yannotti as a liar, claiming that he was coached by detectives before he was recalled, and gave his damaging testimony concerning the identification of the car used by the perpetrators (565-566).

Defense counsel also belittled testimony of Detective Sondergaard, telling the jury that Sondergaard really didn't know anything about the case and merely made an arrest of the defendant driving the car with his wife and children therein.

Counsel then submitted to the jury that a guilty man would not act this way (561-562), and he asked the jury not to condemn the defendant merely because he was driving the car. In this connection, counsel submitted to the jury that they did not believe anyone could have identified the defendant (562).

On the People's summation, the prosecutor was commenting upon the defense summation point that the witnesses Scudera and Vitale only identified the defendant because of his courtroom appearances. In this connection, the prosecutor asked the jury to remember that both Scudera and Vitale based their identifications on the facts and incidents of the robbery. In addition, the prosecutor then asked the jury to recall the testimony of Detective Sondergaard "who testified that he made this arrest based on investigations, and the arrest was made on the 22nd . . . " (584-585).

The prosecutor then asked the jury to use their common sense and draw whatever reasonable inferences are to be drawn (585).

Defense objected to this comment, and the Court overruled the objection (585).

The prosecutor also commented, in reply to remarks made by defense counsel in summation, concerning the New York SP license plate which was on the black Ford when the defendant was arrested. In this connection, the prosecutor advised the jury that counsel's remarks that this plate had been on the car for some length of time was not based on any evidence in the case (600).

The Writ Should be Denied

There are no compelling reasons for granting the writ because the New York State Court of Appeals did not decide a Federal constitutional question heretofore undetermined by this Court.

Moreover, the Court of Appeals has not decided this case in a way probably not in accordance with any prior controlling decision of this Court.

The claim is the trial was delayed unduly depriving the accused of his Sixth Amendment right to a speedy

trial. Before turning to the appropriate legal propositions, a resume of the undisputed facts relative to Ganci reflected by the official court records of the Nassau County Court and the Suffolk County Court demonstrate the following:

March 10, 1965:

Appellant was indicted by a Suffolk County Grand Jury for the crimes of Burglary Third Degree and Injury to Property as a felony under Suffolk County Indictment No. 108/65 and was continued on bail.

July 2, 1966:

Ganci was again indicted in Suffolk under two indictments (363/66 and 364/66) involving Forgery Second Degree (4 cts.) and one count of Petit Larceny. Here, too, appellant was continued free on bail.

October 19, 1966:

Another indictment (483/66) was returned in Suffolk County against appellant charging him with the crimes of Grand Larceny First Degree and Receiving Stolen Property as a felony.

November 4, 1966:

Appellant was arraigned in the Suffolk County Court on Indictment No. 483/66 and in this case was apparently released in his own recognizance.

January 5, 1967:

Appellant, along with Dennis Varick, attempted an armed robbery at the First National Store, Freeport, Nassau County.

February 22, 1967:

Appellant pled guilty to Attempted Grand Larceny Second Degree under Suffolk County Indict-

ment 483/66 in satisfaction of that indictment and all the aforementioned Suffolk County indictments and his bail was continued pending sentence.

March 18, 1967:

Appellant and others committed an armed robbery at the supermarket in the Green Acres Shopping Center, Valley Stream, County of Nassau, which is the subject matter on this appeal.

March 21, 1967:

Appellant arrested in Suffolk County.

March 24, 1967:

Appellant bailed in Nassau County.

March 30, 1967:

Grand Jury in Nassau indicted appellant for Attempted Robbery of the First National Store, Freeport.

April 4, 1967:

Arraigned on the First National job and continued on bail.

April 28, 1967:

Appellant was sentenced to a term of 0 to 5 years by the Suffolk County Court and the judgment thereunder was affirmed by the Appellate Division, Second Department of the Supreme Court of the State of New York on May 13, 1968, and this Court denied leave to appeal on June 13, 1968.

June 1, 1967:

Indicted for Green Acres robbery.

June 13, 1967:

Arraigned for the Green Acres robbery—bail was revoked.

June 14, 1967:

Notice of appearance filed by retained attorney, Joseph Petito, Esq.

November 27, 1967:

Written notice of motion to dismiss for delay in prosecution (5 months since indictment).

February 9, 1968:

The case was on the trial calendar before Judge Dowsey for a plea but was adjourned.

February 14, 1968:

Written motion to dismiss for delay in prosecution denied.

February 15, 1968:

Case adjourned from February 9, 1968 for disposition but defense counsel did not appear.

February 20, 1968:

District Attorney ready for trial. Case held but passed.

February 21, 1968:

Oral motion to reargue motion to dismiss for delay in prosecution denied.

March 5, 1968:

Case in Trial Part held ready subject to an open part.

March 21, 1968:

Joseph Petito, Esq. though retained, asked for and received permission to withdraw as counsel for appellant.

April 2, 1968:

Edwyn Silberling, Esq. assigned to represent appellant.

April 9, 1968:

Edwyn Silberling, Esq. notified the court that he had moved his practice back to the City of New York so he was relieved. Robert Tate, Esq. assigned in his place.

May 8, 1968:

Plea conference with Robert Tate, Esq. No acceptable disposition.

May 29, 1968:

Case again marked ready for trial subject to an open part.

June 17, 1968:

Appellant again requested a plea conference. No satisfactory plea worked out.

August 19, 1968:

Case again marked ready for trial subject to an open part.

September 4, 1968:

Robert Tate, Esq. was relieved at his request and the court assigned Irving Cohen, Esq.

September 25, 1968:

The pre-trial hearings commenced in the County Court before a County Court judge.

September 30, 1968:

The actual trial commenced on this date.

October 1, 1968:

> Following the selection of the jury and openings, counsel again moved orally to dismiss for a delay in prosecution (39). The oral motion was summarily denied (40).

The essence of defendant's argument if we read the petition correctly is this: The 16 month delay, as a matter of law, deprived him of his Sixth Amendment right to a speedy trial. We disagree (*Dickey* v. *Florida* [1970] 398 U.S. 30; *Klopfer* v. *North Carolina* [1967] 386 U.S. 213; *United States* v. *Ewell* [1966] 383 U.S. 116; *Pollard* v. *United States* [1957] 352 U.S. 354; *Beavers* v. *Haubert* [1905] 198 U.S. 77; *King* v. *United States* [1959 D.C. Cir.] 265 F. 2d 567).

This Court has circumscribed the dimension of the Sixth Amendment right to a speedy trial as follows: (*United States* v. *Ewell, supra,* p. 120):

> "We cannot agree that the passage of 19 months between the original arrests and the hearings on the later indictments itself demonstrates a violation of the Sixth Amendment's guarantee of a speedy trial. This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself. Therefore, this Court has consistently been of the view that 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public jus-

> tice.' *Beavers* v. *Haubert,* 198 U.S. 77, 87, 49 L. ed. 950, 954, 25 S. Ct. 573. 'Whether delay in completing a prosecution . . . amounts to an unconstitutional deprivation of rights depends upon the circumstances. . . . The delay must not be purposeful or oppressive,' *Pollard* v. *United States,* 352 U.S. 354, 361, 1 L. ed. 2d 393, 399, 77 S. Ct. 481. '[T]he essential ingredient is orderly expedition and not mere speed.' *Smith* v. *United States,* 360 U.S. 1, 10, 3 L. ed. 2d 1041, 1048, 79 S. Ct. 991."

Tested by the foregoing, we most respectfully submit the delay in this case was neither "purposeful or oppressive." In the first place, the motion to dismiss was made November 27, 1967, which is only 5 months after the indictment which was returned on June 1, 1967.

No one in touch with reality could seriously suggest a Sixth Amendment violation *solely* because of the 5 months between indictment and the making of the formal motion to dismiss. It is conceded this delay was not occasioned by the prosecutor's negligence or mistake (*People* v. *Wallace* [1970] 26 N.Y. 2d 371; *People* v. *Winfrey* [1967] 20 N.Y. 2d 138; *People* v. *Bryant* [1962] 12 N.Y. 2d 719; *People* v. *Piscitello* [1969] 7 N.Y. 2d 387; *People* v. *Sequara* [1959] 6 N.Y. 2d 936).

It was due as all agree to the congested calendars in the trial courts of Nassau County which can be judicially noticed (see, e.g., *People* v. *Howard* [1962] 12 N.Y. 2d 65, p. 68; *People* v. *Stern* [2d Dept. 1957] 3 App. Div. 2d 443, revd. oth. grnd., 3 N.Y. 2d 658; *Hunter* v. *N.Y.O.W. RR. Co.* [1889] 116 N.Y. 615).

The defendant having been sentenced to 5 years in the Suffolk County Court on April 28, 1967, he was promptly returned from a state institution for arraignment in the County Court on June 13, 1967, no more than 12 days after his indictment. The undisputed record clearly proves the prosecutor was acting expeditiously.

Moreover, the record suggests the defendant was really seeking a favorable plea more than a rapid trial date, first, because of the number of conferences had with regard to pleading guilty and, secondly, because of the three different attorneys he ran through. We respectfully submit if the defendant truly wanted a speedy trial, there would be no occasion to conference the case with regard to a plea on a number of occasions and discharge three attorneys.

It is undisputed the County Court Judge in Part I of the Nassau County Court runs the calendar. Cases are tried according to numerical order as determined by the date of indictment. Defendant's trial date was not prolonged because the People were trying fresher indictments. Postponements were due to the trial of older jail cases. The practice is consistent with the Sixth Amendment (*United States* v. *Ewell* [1966] 383 U.S. 116, p. 120) and the standards adopted by the American Bar Association for a "Speedy Trial." The practice is followed generally throughout the country (Freed & Wald, Bail in the United States [1964] p. 83; National Conference on Bail and Criminal Justice, Proceedings and Interim Report [1965] p. 208).

The record convincingly demonstrates the District Attorney of Nas au County acted responsibly. Defendant was sentenced in the Suffolk County Court on April 28, 1967, and he was returned from the State Prison and arraigned on June 13, 1967, less than two weeks after he had been indicted. The case went on the trial calendar promptly and it is undisputed the District Attorney at all times was ready for trial. Unlike other cases (*People* v. *Wallace* [1970] 26 N.Y. 2d 371; *People* v. *Winfrey* [1967] 20 N.Y. 2d 138; *People* v. *Bryant* [1962] 12 N.Y. 2d 719; *People* v. *Piscitello* [1969] 7 N.Y. 2d 387; *People* v. *Sequara* [1959] 6 N.Y. 2d 936), the District Attorney took positive action swiftly and stood constantly ready to try the case.

No Prejudice

Finally, we most respectfully submit this appellant was in no way prejudiced by what happened. In fact, he was obviously assisted because the delay helped the People's witnesses not one bit. Imagine if you will the trial of this case two weeks after the arraignment. Surely the probative force of the eyewitness testimony would be bolstered immeasurably. Defendant's efforts to create a reasonable doubt regarding identification increased with the passage of time. They were not hurt by it one bit.

Summing up, it is respectfully submitted the Sixth Amendment does not provide an arithmetical formula governing when the case must be tried. This Court has told us: " 'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice' * * * 'Whether delay in completing a prosecution * * * amounts to an unconstitutional deprivation of rights depends upon the circumstances. * * * The delay must not be purposeful or oppressive,' * * * 'The essential ingredient is orderly expedition and not mere speed' " (*United States* v. *Ewell* [1966] 383 U.S. 116, p. 120).

CONCLUSION

The petition should be denied.

Respectfully submitted,

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